PUVANESWARAN MURUGIAH

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPLICATION NO. 44-191-90]
25 MARCH 1991

CRIMINAL PROCEDURE: *Detention order - Non-compliance with rules - Whether mandatory or directory - Service of number of copies - Right of representation - Recommendations by Advisory Board - Whether intends to engage Counsel - Risk of prejudice - Substantial prejudice - Liberty of individual - Public Order and Prevention of Crime (Procedure) Rules 1972, r. 3.*

The detainee P was detained under a detention order issued under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (the Ordinance) and was served 1 copy of Form I under r. 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 (the Rules) and was also informed of his right to make representations to the Advisory Board by police officer S. P seeks a writ of *habeas corpus* on the ground of non-compliance with r. 3 of the Rules which provides that it is the duty of the officer-in-charge, as defined in r. 2, to inform the detainee of his right to make representation against the detention order and that it is the duty of the officer in charge to provide the detainee with 2 copies of Form I, or if he intends to engage an advocate, 3 copies.

Furthermore, it was alleged that even if S, who was not the officer-in-charge, could serve the required number of copies of Form I, there was still a breach of r. 3(2) because only 1 copy of Form I had been served upon P instead of the 2 copies required and that the bracketed words in r. 3(2) "or if a detained person states that he intends to engage an advocate to represent him, three copies" imply that a detainee has to be informed at the material time that he has a right to make legal representation in proceedings before the Advisory Board (the Board) for unless a detainee has been so informed, it would not be possible for the officer-in-charge of the detention centre to know whether or not a detainee intends to engage an advocate to represent him.

The defence argued that as P had exercised his right to make representation and there had been a hearing before the Advisory Board which had made recommendations to the Yang di-Pertuan Agong which resulted in the continued detention of P, notwithstanding the breach of r. 3(2), P had not suffered any prejudice.

Held:

[1] A distinction must be drawn between procedural requirements which are "directory" only and those which are "mandatory", that is whether the requirements are vital and go to the root of the matter in which case they would be mandatory and therefore a breach which cannot be condoned. On the other hand, if the requirements of r. 3 are not mandatory, they would be directory only and a breach thereof could be condoned provided there is substantial compliance with the requirements read as a whole and provided no prejudice ensues.

[2] (a) It is manifestly clear that the requirements of r. 3 for the delivery to a detainee of the requisite number of copies of Form I are not just a concession but a right designed to enable and not just to assist him in making representation to the Advisory Board;

(b) if the detainee does not intend to engage Counsel, he shall be provided with two copies, one to be sent to the Advisory Board and the other to be retained by him so that if he does appear before the Board, he will be in a position to refer to it and make oral supplementation - without his own copy, he might be at a disadvantage in proceedings before the Board and thus the risk of prejudice cannot be ruled out and this is sufficient if the requirements are mandatory.

(c) however, if a detainee intends to engage Counsel, it is clear that the advocate must have a copy of Form I to enable him to prepare the detainee's case;

(d) there is an obligation imposed upon the officer-in-charge of the detention centre to enquire of a detainee whether he intends engaging an advocate for unless such an inquiry is made, the officer could not possibly know whether or not to provide a detainee with two or three copies of Form I.

[3] As r. 3(2) deals with a right of representation and since the liberty of a subject being detained without trial is involved, r. 3(2) is mandatory and not merely directory.

[4] In this case, there is no evidence that the officer-in-charge made any attempt to comply with r. 3 and in particular r. 3(2); the only attempt to do so was by S, who was not an independent person, and the attempt of S was unsuccessful as only 1 copy of Form I was served on P, instead of the requisite 2.

[5] Therefore, there has been a serious breach of the mandatory requirements of r. 3(2) the effect of which is to render P's continued detention unlawful - it does not matter that P did in fact make representations to the Board which considered the same and made recommendations; once a breach of a mandatory requirement is established, the fact that the detainee was not prejudiced is irrelevant. It is only where a breach of a directory provision is involved that it would be material to consider whether a detainee has suffered any ensuing prejudice.

[Application for habeas corpus allowed.]

Cases referred to:
Budd v. Anderson [1943] KB 642
Green v. Secretary of State for Home Affairs [1943] AC 284
Liversidge v. Anderson [1942] AC 206
Liverpool Borough Bank v. Turner [1861] 30 LJ Ch 379
Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri and Anor. [1990] 1 CLJ (Rep) 155
Pratap Singh v. Sri Krishnan AIR [1956] SC 140
Punjab Co-operative Bank Ltd., Amritsar v. CIT Lahore [1940] AIR PC 230
Rajoo Ramasamy v. Minister of Home Affairs and Anor. [1990] 1 CLJ (Rep) 256
Re Tan Boon Liat [1977] 2 MLJ 108
Tan Hoon Seng v. Minister of Home Affairs [1990] 1 CLJ (Rep) 271

Legislation referred to:
Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 5(3)
Public Order and Prevention of Crime (Procedure) Rules 1972, r. 2, r. 3(1), (2)

Other sources referred to:
Judicial Review, p. 142 by de Smith

For the applicant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Noor Bahari, Federal Counsel

JUDGMENT

Edgar Joseph Jr J:

In this application for *habeas corpus*, I must, at the outset, mention that it was not until 24 December 1990, that is to say, just some three months before the expiry of his two year period of detention, that the detainee had caused to be filed his application when it was issued on the same day by the registry of this Court with the date 18 January 1991 shown therein as the date of hearing. However, when the matter came up for hearing on that date, an application for an adjournment was made on behalf of Counsel for the detainee, on the ground that Counsel was engaged in another matter in the High Court at Kuala Lumpur. The application was then adjourned to 18 March 1991, (that being a date agreed to by the parties) on which date it was duly heard. It follows that this judgment is being delivered one week after the conclusion of the arguments.

Broadly stated, the question I must address is whether there has been a breach of certain procedural requirements which entitles the detainee to be released.

The detainee was made the subject of a detention order by the Minister for Home Afairs acting pursuant to the powers conferred upon him by s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, (the Ordinance). The ground upon which the order of the Minister was based was that the detainee is a member of a secret society and had committed violent criminal acts which have threatened public order.

In particular, the point taken by Counsel for the detainee is that there had been non-compliance with the requirements of r. 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 (the Rules) made pursuant to s. 5(3) of the Ordinance. To put the matter in perspective, it will be useful to reproduce the whole of r. 3; it reads as follows:

> (1) When any person is brought to a place of detention in pursuance of a detention order it shall be the duty of the Officer in Charge to inform him, as soon as practicable after his arrival, of his right to make representations against the detention order within the time and in the manner hereinafter provided.
>
> (2) It shall be the duty of the Officer in Charge, when informing any detained person of his right to make representations, to provide him with two copies (or, if the detained person states that he intends to engage an advocate to represent him, three copies) of Form I in the Schedule.
>
> (3) The detained person shall, if he desires to make representations, complete one copy of the form in time to enable the Officer in Charge to forward it to the secretary not more than fourteen days after the arrival of the detained person at the place of detention, and it shall be the duty of the Officer in Charge to forward the form to the secretary before the expiry of that period.

The expression "Officer in Charge" is defined under r. 2 as follows:

> 'Officer in Charge', in relation to any place of detention, means the officer (by whatever title described) in charge of that place of detention.

The essential facts, as to which there is no dispute, were that on 30 March 1989 at about 11.30 a.m. at the Contingent Police Headquarters, Jalan Penang, George Town, Penang, Encik Subramaniam a/l Arunasalam, a Police Officer and an Investigating Officer attached to the Anti-Secret Societies Department, had served upon the detainee one copy of Form I within the meaning of r. 3(2), at the same time informing him of his right to make representations to

the Advisory Board. Later the same day, the detainee was escorted to the Detention Centre at Pulau Jerjak, Pulau Pinang, where he was duly detained and remains there to the present day. There is no suggestion that at any time after the detainee was brought to the Detention Centre, the Officer in Charge thereof, had made any attempt to comply with the requirements of r. 3 and indeed the application was argued before me upon the basis that that was the position.

There has been a consistent current of judicial opinion in our Courts, including the latest decisions of the Supreme Court, which indicate that when confronted with the problem of interpreting powers of preventive detention, they have interpreted them strictly so as to require that the provisions of the relevant statute are rigidly and meticulously complied with. (See for example, *Tan Hoon Seng v. Minister of Home Affairs* [1990] 1 CLJ (Rep) 271, *Rajoo Ramasamy v. Minister of Home Affairs and Anor.* [1990] 1 CLJ (Rep) 256 and a series of 11 recent appeals heard together, the first being *Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri and Anor.* [1990] 1 CLJ (Rep) 155 in all of which the detainees succeeded on purely procedural or technical grounds.)

On this basis, it was argued by Counsel that even if the Police Officer Encik Subramaniam could perform the duty of serving the required number of copies of Form I upon the detainee - a duty which is imposed upon the Officer in Charge of the place of detention alone - there was still a breach of r. 3(2) because only one copy of Form I had been served upon the detainee instead of the two copies required therein. It was further argued that the bracketted words in r. 3(2) "or if the detained person states that he intends to engage an advocate to represent him, three copies", carry with it the necessary implication that a detainee has to be informed, at the material time, that he has a right to legal representation in the proceedings before the Advisory Board for, unless a detainee has been so informed, it would not be possible for the Officer in Charge of the detention centre to know whether or not a detainee intends to engage an advocate to represent him.

On the other hand, the Senior Federal Counsel for the respondents argued that in the present case the detainee had in fact exercised his right to make representations and there had been a hearing thereon before the Advisory Board, which had duly made its recommendations to the Yang di-Pertuan Agong, which resulted in the continued detention of the detainee. Accordingly, it was argued that notwithstanding the breach of r. 3(2) the detainee had suffered no prejudice.

In reply, Counsel for the detainee argued that he need not show actual prejudice suffered by the detainee; a risk of prejudice would suffice.

In my view, in considering the question posed by this application a distinction has to be made between procedural requirements which are of direct relevance to the detention order and those which are not. To put it another way, a distinction must be drawn between procedural requirements which are "directory" only and those which are "mandatory". The principle involved is simple enough to state but its application to specific cases is often not free from difficulty, as has been aptly put by de Smith in his book, Judicial Review, at p. 142:

The law relating to the effect of failure to comply with procedural requirements resembles an inextricable tangle of loose ends.

R v. Home Secretary, Ex. p. Budd (The Times, 28/5/41) was an example of grave departmental blunders in the making of detention orders. The detainee had not been given a document setting out the proper grounds for his detention as required by the regulation. The reason

given for Captain Budd's detention was "hostile associations". For this allegation there was no ground whatever and Humphreys J described the detention order as "worthless". Viscount Caldecott LCJ said of it in [1941] 2 All ER at p. 751:

> It not only did not give the applicant proper information to enable him to exercise his rights under Reg. 18B(4) but it gave him wrong information, and moreover failed in its purpose of providing authority for the applicant's detention.

Singleton J said:

> When I see the complete mistake that has occurred here, and there is no explanation, I am lost in amazement.

Lord Greene MR ([1942] 1 All ER at p. 377) referred to the incident as "a cynical piece of carelessness". *Habeas corpus* was granted.

Upon his release, Captain Budd brought an action for false imprisonment against the Home Secretary, basing his claim on the detention order which the Divisional Court had earlier struck down. Asquith J held that that decision was inconsistent with the later cases in the House of Lords of *Liversidge v. Anderson*[1942] AC 206 and *Green v. Secretary of State for Home Affairs* [1943] AC 284 - that is that *habeas corpus* was wrongly granted - and judgment was given for the defendant. (*Budd v. Anderson* [1943] KB 642).

In *Green's* case (*supra*), a similar error to that which occurred in *Captain Budd's* case, did not vitiate the detention order. In particular, the detention order alleged "hostile associations" but when the detainee appeared before the Advisory Committee, he was informed that he had been "recently concerned in acts prejudicial to the public safety and the defence of the realm, and in the preparation of such acts". It was said that the statutory requirement for the delivery to the detainee of a document spelling out the grounds for his detention was merely a concession to assist him in making representations to the Advisory Committee which could recommend release to the Minister. Accordingly, non-compliance with the statutory requirement did not reflect back upon the detention order.

I recognise that *Captain Budd's* case and *Green's* case were War time cases decided in times of imminent national peril so every possible benefit of the doubt was given to the Home Secretary. Moreover, the recent decisions of our Supreme Court, cited above, suggest a far greater willigness to assert control over the exercise of power by the Executive in preventive detention cases.

Accordingly, in my approach to the question whether the requirements of r. 3 are mandatory or directory I must ask myself the further question whether the requirements are vital and go to the root of the matter in which case they would be mandatory and therefore a breach thereof cannot be condoned for, as H.S. Ong FJ said in *Re Tan Boon Liat* [1977] 2 MLJ 108 at 116:

> there are mandatory rules, even of procedure, which cannot be passed over lightly as irregularities, because they are incurably illegal as being in contravention of strictly imperative provisions.

If the requirements of r. 3 are not mandatory, they would be directory only and a breach thereof could be condoned provided there is substantial compliance with the requirements read as a whole and provided no prejudice ensues.

I derive support for the approach I propose adopting from the Indian Supreme Court decision in *Pratap Singh v. Sri Krishnan AIR* [1956] SC 140 where the appellant was a candidate for the office of President of a Municipal Committee. The nominations were made on forms which

were old forms requiring the caste of the candidate to be stated, whereas the changed rule required the occupation of the candidate to be stated. All candidates filed their nominations in the old forms, but the respondent who knew the change in the law, struck out the word 'caste' put in 'occupation' and gave his occupation. The appellant having been elected, the respondent challenged the election and the High Court, on appeal, set aside the election. Allowing the appeal, the Supreme Court held:

> We do not think that any failure to comply with any of the provisions set out in the various rules is fatal, and we deprecate this tendency towards technicality; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as a whole and provided no prejudice ensues; and when the legislature does not itself state which is which Judges must determine the matter, and, exercising a nice discrimination, sort out one class from the other along broad based common sense lines.

Similarly, in the Privy Council case of *Punjab Co-operative Bank Ltd, Amritsar v. CIT Lahore AIR* [1940] PC 230, Viscount Maugham referred to the same principle in these terms:

> It is a well settled general rule that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

So, also, in *Liverpool Borough Bank v. Turner* [1861] 30 LJ Ch 379, Lord Campbell said:

> No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with the implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

It is manifestly clear that the requirements of r. 3 for the delivery to a detainee of the requisite number of copies of Form I wherein appear the grounds for his detention are not just a concession but a **right** designed **to enable and not just to assist** him in making representations to the Advisory Board which has the power to recommend his release to the Yang di-Pertuan Agong. If he does not intend to engage Counsel then he **shall** be provided with **two** copies of Form I - one to be sent to the secretary of the Advisory Board and the other to be retained by him for his reference, so that if and when he appears before the Advisory Board he will be in a position to refer to it and, if he so wishes, to make oral supplementation. Without his own copy therefore he might well be at a disadvantage in proceedings before the Advisory Board.

If, on the other hand, a detainee intends engaging an advocate, it goes without saying that the advocate too must have a copy of Form I to enable him to prepare a detainee's case; hence the requirement by the bracketted words in r. 3(2) that a detainee **shall** be provided with three copies of Form I should he intend to engage an advocate to represent him.

I agree, therefore, that there is an obligation imposed upon the Officer in Charge of the detention centre to enquire of a detainee whether he intends engaging an advocate for, unless such an enquiry is made, the officer could not possibly know whether or not to provide a detainee with two or three copies of Form I.

Taking a good look at the subject matter of r. 3(2) and, considering its importance and its relation to the general object intended to be secured by it, and that we are here dealing with a matter involving the liberty of the subject in a case of detention without trial, I am compelled to the conclusion that r. 3(2) is mandatory and not merely directory.

Turning to the particular circumstances of the present application, according to the evidence before me there is, I repeat, no indication that the Officer in Charge of the detention centre had made any attempt to comply with the requirements of r. 3 and in particular, r. 3(2). I would, in passing, observe that r. 3 suggests that Parliament requires an independent person, namely, the Officer in Charge of the detention centre to fulfil the duties imposed by it. The only attempt to do so was by the Police Officer Encik Subramaniam and this attempt too was not successful in that only one copy of Form I instead of the requisite two copies were served upon the detainee.

It follows, therefore, that there has been a serious breach of the mandatory requirements of r. 3(2) the effect of which is to render the detainee's continued detention unlawful. It matters not one whit that the detainee did in fact make representations to the Advisory Board which considered the same and made recommendations thereon which led to the detainee's continued detention. In other words, once a breach of a mandatory statutory requirement is established the fact that the detainee was not prejudiced is irrelevant. It is only where a breach of a directory provision is involved that it would be material to consider whether a detainee has suffered any ensuing prejudice. (See *Pratap's* case cited above.)

In any event, as I have already noted, failure to provide the detainee with his own copy of Form I for his retention and use at the proceedings before the Advisory Board might well have been a disadvantage to him and thus the risk of prejudice cannot be ruled out. The Court will not go into the likelihood of prejudice. The risk of it is enough.

This application for *habeas corpus* is therefore granted and the detainee must be set at liberty forthwith.

By way of postlude, I would observe that although the detainee may well think that the result of this application is a pyrrhic victory since the period of his detention would, in any case, have expired in three days' time, he must remember that it was his inaction and delay which had contributed substantially to this, as I have indicated at the outset. Nevertheless, this judgment may perhaps be useful as providing yet another precedent on the subject of preventive cases in this country.

Also found at [1991] 2 CLJ 1199